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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 921

MARVIN S. SAMUELS,
Petitioner,
vs.
THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the
State of California

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Petitioner, Marvin S. Samuels, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California, entered July 19, 1967.

OPINIONS BELOW

The opinion of the California Court of Appeal, *People v. Samuels,* 58 Cal. Rptr. 439, is attached

hereto as Appendix A. The opinion of the Supreme Court of the State of California is reported in 250 A.C.A. 571.

JURISDICTION

The judgment of the California Court of Appeal was entered April 28, 1967. The judgment denying hearing by the Supreme Court of the State of California was entered July 19, 1967. Upon counsel's motion timely made to the Supreme Court of the United States, Justice William O. Douglas granted until December 16, 1967, for filing of this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), since a right, privilege or immunity is specially set up and claimed under the Constitution of the United States, as more particularly set forth hereafter.

QUESTIONS PRESENTED

1. Whether the people's prosecuting attorney may willfully conceal or suppress applicable defense evidence unknown to defendant and counsel, in the possession of the prosecutor.

2. Whether the people's prosecuting attorney may willfully mislead the Court by stating falsely and knowingly in his closing argument to the jury:

> "The only evidence on the subject *there is no letter from them* (the Kinsey Institute at the

University of Indiana), there is no authorization. There is no witness from them. *There is not the slightest indication that if they were legitimate they had anything to do with this movie* other than Mr. Anger (prosecution witness) who is an unusual man who does, apparently, from time to time, send them things." (Reporter's Transcript, Volume V, pp. 1575-6, lines 23-26, 1-3; emphasis added.)

"*There is no evidence anywhere* in the case that the doctor had any contact at all with the Institute of Sex Research at the University of Indiana. *There is no evidence that they in any way* commissioned, authorized, paid for, *suggested these be made, other than the statement of Anger* (prosecution witness) that from time to time he had shipped them material." (Reporter's Transcript, Volume V, p. 1507, lines 15-21; emphasis added.)

"He had all of this gear ahead of time, and to say he did this in aid of a legitimate scientific and educational purpose, I think, flies in the face of the evidence. I am not going to decide. I never decide cases. It is up to you. I present it, and you are the ones who make the decision. I just think that to say that on this evidence is to (sic) far-fetched. Unintelligent man, perhaps, with low intelligence, might meet some fellow like Anger, be enthused upon a scientific adventure under those circumstances; in that context and at that time of night a stranger and all the rest of it, *with no contact whatsoever with any legitimate firm or educational organization such as Kinsey,* or anything else, no letter, *no nothing,* I think it flies in the face of the evidence. You will

have to decide it, because, as I conceive it, there is no principal defense to those two charges." (Reporter's Transcript, Volume V, p. 1509, lines 6-20; emphasis added.)

Additionally, throughout the prosecutor's cross-examination and closing argument in numerous references he brainwashes the Court and jury into a false belief *that there is no written material or sanction from the University of Indiana* other than the *oral testimony* of the prosecution's witness, Kenneth Anger. *All the while the prosecutor had in his possession the following letter:*

"Indiana University
Bloomington, Indiana

September 21, 1964 Jordan Hall

Institute for Sex
Research, Inc.
Founded by Alfred
C. Kinsey

Mr. Kenneth Anger
850½ North Coronado Street
Los Angeles 26, California

Dear Ken:

In keeping with your wishes we cleaned the projector, projected the film only once, and mailed it back to you the same day it was received. To be scientifically accurate perhaps I should say that I gave it to Bill to return to you that same day and to enclose a *note of gratitude. The film was, as you knew it would be, of definite interest to us and we look forward to the final product. Thank you very much.*

You also have our thanks for the archival material you donated. The *Sphinx Club murals* intrigued me since I recalled your story of how they were photographed. Mrs. Egan was much taken with the Crowley book, especially since publications from the Mandrake Press are rare.

Best regards,
/s/ Paul
Paul H. Gebhardt"

PHG:s
(Emphasis added.)

3. Whether the people's prosecuting attorney may violate with impunity the California Bar Act which, in referring to lawyers engaged in public prosecution, provides:

"The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. *The suppression of facts* or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible." (Emphasis added.)

The California State Bar Act and Rules of Professional Conduct (September 1965) §5, p. 40.

The California Court of Appeal has accepted this unethical conduct by the prosecuting attorney by stating:

"The conduct in question obviously related to the conspiracy charges only and could not conceivably have contributed to defendant's conviction of aggravated assault."

People v. Samuels, 58 Cal. Rptr., p. 449 ¶18.

In light of the problem of improper joinder of offenses as indicated in Question No. 3, supra, can the California Court of Appeal answer affirmatively, the following test:

> ". . . that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."
>
> *Chapman v. California,* 17 L. Ed. 2d 705 (1967).

4. Whether a defendant receives a fair trial when the prosecutor includes counts of a State Statute which is clearly unconstitutional and which statute is in fact subsequently so declared to be unconstitutional, the appellate court issuing an order of reversal and dismissal of those invalid convictions, *People v. Samuels,* 58 Cal. Rptr. 439.

Should the defendant be given a fair trial on the one remaining count, without the now dismissed inflammatory and unconstitutional counts, as required by the Fourteenth Amendment to the United States Constitution? *Sheppard v. Maxwell,* 384 U.S. 333.

5. May a defendant be convicted of the crime of assault by means of force likely to cause great bodily harm when in fact no such assault ever occurred; where there never was a "victim"; where there was no complaint; and where there was no corpus delicti; all in contravention of the Fourteenth Amendment to the United States Constitution?

6. Whether, when a search is made pursuant to a search warrant, the seizure of material not described

therein is illegal as exceeding the scope of the search warrant in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

7. Whether, when a search is made incidental to an arrest, the seizure of *non*-contraband material *not* evidence of the alleged crime for which the arrest is made, may be sustained.

8. Whether defendant's rights under the Fifth Amendment to the United States Constitution were violated by the prosecuting attorney procuring his arrest based on an information charging aggravated assault from an inferior court *after* the County Grand Jury refused to indict the defendant on the identical evidence.

9. Whether in the absence of the corpus delicti of the crime of assault, the Court erred in permitting double hearsay statements about the defendant's reputation as a sadist to be introduced into evidence. *Example:* (1) Anger, prosecution witness, who purportedly told (2) Logan, prosecution witness, who stated this double hearsay in Court. (Reporter's Transcript, Volume I, p. 127, line 9 to p. 147; p. 153, line 25 to p. 154, lines 1-12.)

> ("Peculiar or characteristic behavior pattern" known as modus operandi, a characteristic method or plan pursued by a defendant in the performance of repeated criminal acts does "not open the door to indiscriminate proof of the defendant's sadistic character." *People v. Chambers*, 231 C.A. 2d 23.)

10. May sui juris parties enter into a valid sado-masochistic relationship where the acts are in private with no opportunity for the public to know of their existence by any means?

11. May the petitioner now with a silent record attack the impropriety of the trial facets as follows: A change of venue should have been sought due to the undue amount of sensational publicity which the local news media gave the case from the time of arrest and throughout the trial; a local practicing physician who was, according to the press, receiving guests in his "torture chamber" from as far away as New York for administration of beatings while bound and gagged.

STATEMENT OF THE CASE

This Court is respectfully referred to the Court of Appeal's decision of April 28, 1967, in the Appendix, infra, for a resume of the facts giving rise to the case.

After the Court of Appeal's decision was rendered, the defendant was ordered to appear in Superior Court for the modification proceeding as directed. At this hearing the original prosecuting attorney moved that the Court set a new trial date for the two matters ordered vacated and set aside and then became so emotional and distraught that the Judge had to postpone the hearing to another date and assigned the matter to another Judge.

On September 11, 1967, the Honorable Harold Holden signed a Modified Order of Probation (1) re-

ducing the original 10-year period of probation to 5 years from October 7, 1965, the date of the original imposition of sentence; and (2) lowering the fine to $2,000.00 plus penalty assessment in the amount of $200.00, said fine and assessment to be paid after termination of upper Court proceedings. This was pursuant to a stipulation of the district attorney's office with a different and objective attorney than the one who had previously handled the case.

REASONS FOR GRANTING THE WRIT

1. A calloused and reprehensible act by the prosecuting attorney occurred in the trial. Questions presented in Nos. 1, 2 and 3, all present distinct areas of misconduct which violated the defendant's right to a fair trial as demanded by the Fourteenth Amendment to the United States Constitution. Obviously the trial record is silent by way of objection by defense trial counsel due to his ignorance of the chicanery being practiced by the prosecutor. Concealment of evidence by a private attorney; misleading the Court and jury with outright falsehoods by a private attorney; and disregard of proscribed ethics by a private attorney; would result in his being properly dealt with in the most severe manner available to the Courts and the Bar Association. This Court is asked to follow through on its unequivocal stand as recently enunciated in *Giles et al. v. State of Maryland,* and *Miller v. Pate,* infra, and crystalize the principle that the "People's"

advocate has a responsibility to work within the framework of honesty and responsibility.

> "A criminal trial is not a game of wits between opposing counsel, the cleverer party, or the one with the greatest resources, be the 'winner'."
>
> "A number of circuits have recently held that the deception that results from negligent nondisclosure is no less damaging than that which is a product of guile and that such nondisclosure entitles the defendant to relief. We find the reasoning of such cases persuasive and essential to the fair administration of criminal justice especially in view of the disadvantages facing the accused in the trial process."
>
> United States Court of Appeals, District of Columbia Circuit, *Levin v. Katzenbach,* 363 F. 2d 287 (1966);
>
> "The Duty of the Prosecutor to Disclose Exculpatory Evidence," 60 Columbia Law Review 858 (1960);
>
> "The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant," 74 Yale L. J. 136 (1964).

Mr. Justice Fortas in *Giles,* infra, has stated:

> "The State's obligation is not to convict, but to see that, so far as possible, truth emerges . . . No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses."
>
> ". . . our total lack of sympathy for the kind of physical assault which is involved here may not

lead us to condone state suppression of information which might be useful to the defense."

"I believe that deliberate concealment and nondisclosure by the State are not to be distinguished in principle from misrepresentations."

"The State's pursuit is justice, not a victim. If it has in its exclusive possession specific, concrete evidence which is not merely cumulative or embellishing and which may exonerate the defendant or be of material importance to the defense—regardless of whether it relates to testimony which the state has caused to be given at the trial—the State is obligated to bring it to the attention of the court and the defense."

"If the defense does not know of the existence of the evidence, it may not be able to request its production. A murder trial—indeed any criminal proceeding—is not a sporting event."

Giles et al. v. State of Maryland, 17 L. Ed. 2d 747 (1967);

Miller v. Pate, 17 L. Ed. 2d 690 (1967).

2. The prejudicial effect to the defendant by virtue of the prosecutor overbooking and overcharging is no accident. The enforcement authorities, as is usual, in the instant case charged beyond and attempted to prove beyond any legitimate belief in the validity of their cause, a hodgepodge of crimes. All in high hopes forcing a "cop out plea" or arousing prejudice in the trial. The latter amply succeeded. The defendant was charged with: (1) *two counts* of conspiracy (P.C. 311.2) to prepare and distribute obscene matter; (2) *two counts* of assault (P.C. §245) by means of force

likely to cause great bodily injury; (3) and *a final count* of sodomy (P.C. §286). The jury acquitted on the sodomy charges, convicted on the two conspiracy charges and one charge of aggravated assault and the offense of single assault included in the other charge of aggravated assault.

The simple assault conviction was subsequently dismissed.

The Court of Appeal directed the trial court to vacate and set aside the two convictions of conspiracy. This was based on the fact that the statute, California Penal Code §311.2 as interpreted had been found in violation of the First and Fourteenth Amendments to the federal Constitution. *In re Klor* (1966), 64 Cal. 2d 816; *People v. Samuels,* supra.

Our earnest belief is that the defendant should be given a new trial on the one remaining count of P.C. 245. This trial would not be inherently prejudiced as was the first one. The four other invalid counts having been disposed of as indicated in the preceding paragraph, could not now inflame the prejudices and intensify the insecurity of the Court and jurors. A fair, impartial and objective trial could be had to determine the innocence or guilt of the defendant.

3. The instant appellate decision ignores the historical requirement for a corpus delicti. A film made for educational and scientific research has been accepted as proof enough that crimes aplenty were committed—films made by a highly qualified practicing physician in cooperation with the University of In-

diana's Kinsey Institute for Sex. No complainant or so-called "victim" has complained or testified against the physician defendant.

The field of make-believe as portrayed on film and the stage are now at the mercy of some ill or vicious prosecutor who may cause an arrest of the actors and use the film as his "evidence" of a crime; it worked so far in the instant case. The First and Fourteenth Amendments to the federal Constitution have thusly been ignored.

4. If the rules of evidence we have developed mean anything, double hearsay as outlined in Questions Presented (No. 9, supra), certainly indicate an abuse. *People v. Chapman,* supra, makes a fine landmark to use as a comparison.

5. History is replete with innumerable examples of the subject of sadomasochism. From the earliest records of civilization we find evidence of this. From the cartoonist caveman with mace dragging the smiling female; the various religious orders with self-flagellation as well as corporal punishment by the holy superiors; the overbearing dominating wife to her effacing husband; to sports contests in general; e.g. cock fights, bull fights, wrestling, boxing—these are all forms of sadomasochism. This facet of the homo-sapien personality exists. It has been only recently that the field of science has attempted to help us take inventory of this machine called man and his true being. The history of progress is strewn with innumerable examples of where some poor miserable inse-

cure soul with a badge of authority has said, "STOP in the name of decency" and prosecuted the van. Science is beginning to try to help by inquiring into the ramifications of sadomasochism if they can have the protection of the law to keep them out of jail in the process. Recent articles of note are: Play, Paradox, and People: The Myth of Normality, by Don D. Jackson, M.D., in Medical Opinion and Review, Vol. 3, No. 5, May, 1967; Cities: A Study in Sadomasochism, by Jack Chernus, M.D., in Medical Opinion and Review, Vol. 3, No. 5, May, 1967.

6. As reluctant as petitioner's counsel is to attack trial counsel, the record does leave much to be desired. The point raised in Questions Presented No. 11 being a prime example. San Jose, California, is an overgrown adolescent farming community. Its proximity to internationally renowned centers of learning and cosmopolitan cities has not affected its rural character. It is this lack of sophistication in both the news media employees and the peers of the community which combined to prevent the defendant from getting a fair trial. After all, jurors knew that *their* peers had been reading all the lurid details of the trial in the newspapers, listening on the television and radio call-in-and-gossip programs. This knowledge and the fact that they would be embarrassed to have found the petitioner "not guilty" contributed to the guilty verdicts. A trial on the merits of the case away from the community where gossip and irresponsible "news" coverage glutted the Court and jury would have given the blindfolded lady with the scales a chance. As it

was, the lady's scales were weighted down by an irresponsible group of scavengers of "news". *Sheppard v. Maxwell,* supra.

CONCLUSION

Certiorari should be granted and the judgment below reversed.

Dated, San Francisco, California,
December 11, 1967.

Respectfully submitted,
EVANDER C. SMITH,
Attorney for Petitioner.

ROBERT S. FIELD,
Of Counsel.

(Appendix A Follows)

Appendix A

In the Court of Appeal
State of California
First Appellate District

DIVISION TWO

1 Criminal No. 5577

People of the State of California,
Plaintiff and Respondent,
v.
Marvin S. Samuels,
Defendant and Appellant.

OPINION

Defendant Marvin Samuels was charged by indictment with two counts of conspiracy to violate Penal Code, section 311.2 (preparing and distributing obscene matter); two counts of assault by means of force likely to cause great bodily injury (Pen. Code, § 245); and a final count of sodomy (Pen. Code, § 286). Defendant pleaded not guilty to all charges.

The jury acquitted defendant of sodomy but found him guilty on both charges of conspiracy, one charge of aggravated assault and the offense of simple as-

sault included in the other charge of aggravated assault. The simple assault conviction was subsequently dismissed. The court suspended the imposition of sentence, fined defendant $3,000 and placed him on probation for a period of 10 years.

Defendant appeals from the order granting probation and from an order denying his motion for new trial as to the conspiracy and aggravated assault charges. The latter order is nonappealable.

Defendant Samuels, an opthalmologist, testified that he recognized the symptoms of sadomasochism, in himself, and his primary concern became to control and release his sadomasochistic urges in ways which were harmless. Through his hobby of photography, he participated in the production of several films on the east coast. Three of these films depicted bound individuals being whipped. Defendant wielded the whip in two of the films and acted as the cameraman, producer and director for the third film. He testified that the apparent force of the whippings was "faked" and that cosmetics were used to supply the marks of the apparent beating. Defendant produced one of these films at the trial.

In early September 1964, defendant met Kenneth Anger in San Francisco. Anger was a self-employed film director who made such films as "Fireworks" and "Scorpio Rising." He had also been a close friend of Dr. Kinsey from the institute by that name, had been a buyer for the institute for a period of seven years, and had an authorization to send material through the mails.

On the night of their initial meeting, Anger introduced himself to defendant and inquired whether defendant had seen "Scorpio Rising." Defendant replied that he had not. Defendant had seen "Fireworks," however, and considered it the most sadomascochistic film he had ever seen. He told Anger that he himself had made two or three rolls of film dealing with sadomasochistic activity and was interested in having them developed. Anger volunteered to have the films developed and also told defendant that he believed that the Kinsey Institute would be very interested in examining the footage and might want the films for their collection, since they were then studying the subject of sadomasochism. Defendant agreed to mail the films to Anger's Hollywood address. There was no discussion of having the films developed at an ordinary camera store.

In the middle of September, defendant mailed the three rolls of film to Anger in Hollywood. Anger sent the rolls to a local film service laboratory, and picked up the developed film several days later. One of the rolls was badly underexposed and nearly black. The other two rolls were visible, although slightly underexposed. Anger mailed the latter two films to Dr. Gebhardt of the Kinsey Institute, having previously written him and informed him that he was on the trail of footage which he thought would interest the institute. Anger mailed the underexposed roll to defendant.

Dr. Gebhardt returned the films to Anger, who mailed them to defendant.

Anger's next contact with defendant occurred in early November. The two men dined at a San Francisco restaurant and defendant stated during the course of the dinner that he had edited the films which Anger had developed for him, and he also stated that he intended to make more films of a sado-masochistic nature. Anger again volunteered to have them developed, and told defendant to mail them to Anger's San Francisco address. Defendant indicated that an individual who would play the role of the masochist in a future film was coming from out of state. When Anger again stated that the Kinsey Institute would be interested in the films, defendant expressed a willingness to donate to the institute both the films he had already made and those he intended to make. There was never any discussion of making the films available to the general public or to anyone other than the Kinsey Institute.

After dinner, defendant and Anger went to defendant's home, where the two rolls of film which he had edited were projected. Anger saw that the two rolls had been spliced together and that a shot of a solitary figure wielding a whip had been taken from the end of one roll, where it had previously appeared, and had been cut into several pieces and reinserted at various places in the two combined rolls. This film constitutes the basis for the second conspiracy count and will hereafter be referred to as the "horizontal" film.

At the trial Anger identified defendant as the man wielding the whip.

Anger's next contact with defendant occurred in mid-November, when he received two rolls of film from him. Anger deposited the films at Schaefer's Camera Store in San Francisco, using the fictitious name of "Jackson" and giving a false address. He subsequently returned to the camera shop and was told that only one of the films had thus far been developed and returned to the shop. He paid the developing fee and picked up the film.

The other roll of film had been sent by the camera shop to the Eastman Kodak Company in Palo Alto for processing. The company contacted the Palo Alto Police Department and projected the film for certain police officers and prosecuting attorneys, who confiscated the film.

A dummy roll of film was left at Schaefer's Camera Store. On November 20, Anger picked up this film and was apprehended by the police of San Francisco. Anger was taken to the Hall of Justice where he was questioned concerning the defendant and the films.

Later that day, the Santa Clara County District Attorney's Office obtained a warrant authorizing a search of defendant's home for whips and other instruments of torture.

Anger and several police officers of San Francisco then drove to the Santa Clara County District Attorney's Office, arriving there about 7:30 p.m. They viewed the film which Inspector Nieto of San Francisco had obtained from Eastman.

This film, which will henceforth be referred to as the "vertical" film, constituted the basis for the first conspiracy count and the aggravated assault charge. It shows a gagged and naked man strung up in an unfinished room, receiving a beating with whips and lashes administered by a man whom Anger identified as defendant. There are marks on the victim's buttocks, the small of his back and further up on his body. The film contained no splices.

After viewing the film, all of the officers proceeded to defendant's Sunnyvale residence, arriving there at approximately 9:00 p.m. When defendant opened the door, he was informed of the search warrant, it was read to him and then handed to him. The officers then entered the house and observed that the living room was in semidarkness and that a movie screen was set up in the living room, and a projector was on the dining room table. Two canisters of film were on the table by the projector. One canister contained the "horizontal" film, and the other contained a travelogue entitled "Fire Island," which defendant had made on the east coast.

Nieto accompanied defendant into the bedroom and was subsequently joined by Logan of the district attorney's office, who advised defendant of his rights to counsel and to remain silent. Logan then asked defendant the name of the individual who was strung from the beam in the "vertical" film. Defendant replied that he did not know his name and that he had met him in a San Francisco bar. In response to further questioning, defendant said that the film had

been made in an unfinished room in the Sunnyvale house. He further stated that no third party was present when the film was made, and automatic camera settings were used. He then refused to say anything further until he had consulted an attorney.

Defendant was subsequently questioned by Nieto. The man in the "vertical" film was an individual whom he had met either at a "gay" bar or at Foster's. Defendant thought his name was "George," but did not know his present whereabouts. The man approached him and stated that he was an "M" looking for an "S." The man thereafter came to defendant's home and voluntarily submitted to the beating. Defendant admitted that he was a well-known sadist and stated that he was one of the best in the business. When asked about the white substance on the face of the victim in the film, defendant stated that it was adhesive tape. He subsequently accompanied Nieto into the unfinished room in his house and identified the studs to which the victim's feet had been anchored during the filming.

Lowell Bradford, Director of the Santa Clara County Laboratory of Criminalistics and a qualified expert, testified that he had extracted certain sections from the "vertical" film by way of color slides which were then made into prints. This film, as above noted, contained no splices. His examination of the prints taken from a "representative area" of the film led him to the conclusion that the camera could not have been stopped so as to allow for the application of cosmetics and that the marks and welts which ap-

peared on the victim during this portion of the film occurred progressively from frame to frame in slow development and were not the result of any retouching. Bradford had made a similar examination of a representative area of the "horizontal" film and had concluded that the welts on the victim had progressively developed during uninterrupted sections of the film without any indication of camera stops during which cosmetics could have been applied. There was no evidence that either the "vertical" or "horizontal" films had been retouched and Bradford was of the opinion that both films truly and correctly represented what was before the camera at the time. Edward Chong, Senior County Photographer, and Rudolph Stohr of the Eastman Kodak Company, were of the same opinion as to the absence of retouching and the accurate depiction of the scene before the camera.

On cross-examination, Bradford admitted that he had never examined defendant's camera, a Bolex, and was generally unfamiliar with that type of camera. With the exception of one stop early in the film, his notes indicated no other distinct stops in the "vertical" film. He saw no interruption in the continuity of action and did not know whether the clear frames were actual stops or were attributable to a shutter fault. Since he had not examined the camera, he did not know whether it had any such defect.

Bradford had also performed a laboratory examination of the riding crop, belt, cane and lash used to strike the victims in the two films and had been unable to detect any traces of blood or cosmetics.

Defendant testified on his own behalf and admitted making both films in his home. The man who had been strung up in the "vertical" film had telephoned defendant after he had let it be known in the San Francisco "underground" that he wanted volunteers for sadomasochistic films to be sent to the Kinsey Institute. Defendant arranged to meet him at the San Jose bus depot and drove him to his Sunnyvale home. After the filming had been completed, defendant drove him back to the bus depot in the "same condition he came in." During the course of the filming, which took some four hours, defendant strung the man up with hospital restraints and struck him lightly with a riding crop, pulling his punches just before striking the man's body. He stopped the camera periodically and applied cosmetics. Defendant had coached the man to move violently so as to make the film seem realistic.

Defendant's testimony as to his arrest and the search of his home varied considerably from that of the officers.

John Barnes, a professional photographer, testified for the defense and stated that defendant's camera was of a type which could be stopped without any indication of stoppage, such as a blank frame. The prosecution established that Barnes had been convicted of a felony.

Dr. Robert Malone, a surgeon and physician whose practice included serving as team physician for a high school football team for a period of 10 years, was of the opinion that the marks on the victims in

the "vertical" and "horizontal" films could have been caused only in part by the blows inflicted during the course of said films; that as to the "vertical" film, the dark coloration which appeared after the initial redness would not show up until at least 12 hours after the blow or trauma and certainly not within a period of a few minutes, as depicted in the film. The doctor testified at length as to the effect of the body being struck a violent blow in support of his opinion. If he were to assume that the marks did accurately depict the victim's reaction to the blows depicted in the film, his medical opinion would be that there would of necessity have been a breaking of the skin and some bleeding, which would be detectable on the instruments used to inflict the beating. He could conceive of no physiological or medical explanation for this change and believed that cosmetics must have been applied to the surface of the skin.

Defendant challenges the validity of his conviction of conspiracy and assault on numerous and diverse grounds. However, as far as the counts of conspiracy are concerned, it is necessary to discuss only one of defendant's arguments.

Defendant correctly points out that in the recent case of In re Klor (1966) 64 Cal. 2d 816, the court held that section 311.2 of the Penal Code does not penalize the mere *preparation* of obscene material without the intent to distribute or disseminate such material. The court reasoned that if the statute were to be construed as a prohibition against mere preparation, it would interdict individual expression in a

manner violative of the First and Fourteenth Amendments to the federal Constitution. The court concluded that "No constitutionally punishable conduct appears in the case of an individual who prepares material for his own use or for such personal satisfaction as its creation affords him" (p. 821).

In the Klor case, the trial court had instructed the jury that it should convict petitioner if it found that he had *either* prepared obscene material *or* had possessed it with intent to distribute. After the judgment of conviction had become final, petitioner sought a writ of habeas corpus. Although the court pointed out that petitioner, who was attacking the judgment collaterally, had the burden of showing that he had not been tried and convicted for violating the valid part of the statute, the court held that this burden had been met because the evidence of preparation was essentially uncontradicted and the evidence of intent to distribute was extremely weak.

In the instant case, defendant was convicted of two counts of *conspiring* to violate section 311.2. It is axiomatic that if he could not be found guilty of the substantive offense without possessing intent to distribute the material in question, he could not be found guilty of conspiring to violate that section in the absence of evidence that he and one or more other persons entered into an agreement to prepare *and distribute* obscene material.

The evidence in the present case, as in Klor, leaves no doubt that it was defendant who prepared the two

films. Defendant admitted that he did so and testified at length regarding the photographic and acting techniques employed. However, the record is utterly devoid of any evidence that he and another individual ever agreed to distribute or exhibit the films to anyone other than a scientific institute which would presumably be unaffected by any prurient appeal which the films allegedly possessed. Although the record does reveal that either one or two unidentified individuals enacted sadomasochistic roles in the earlier "horizontal" film, there is not one shred of evidence suggesting that either of these individuals ever discussed with defendant the use which he intended to make of the films. For all that appears in the record, these individuals may well have been totally unconcerned with defendant's purpose in making the films. The evidence similarly fails to reveal that defendant ever discussed his motives for filmmaking with the unidentified individual who played the role of the masochist in the "vertical" film, except that defendant had "let it be known" that the film was intended for the Kinsey Institute. The evidence pertaining to defendant's dealings with Anger likewise fails to show that the two men ever discussed distributing or exhibiting the films to anyone other than the Kinsey Institute.

The People's position with regard to the evidence allegedly proving the existence of a conspiracy merely serves to emphasize the total lack of any such proof. The People place no reliance upon defendant's deal-

ings with Anger but assert only that "The jury could properly infer that the parties who came to [defendant's] home for the purpose of participating in his movies, and did participate in the movies, agreed to violate the law." This argument begs the question. Although it is doubtless true that these individuals' participation in the films supports an inference that they did so by prearrangement and had thus conspired with defendant to *prepare* the films, preparation and distribution are obviously not the same, and an intent to do both is an essential element of the conspiracy charges. To hold that an agreement to assist in the preparation of films must also constitute an agreement to distribute the films would utterly vitiate the holding of the Klor case.

In the light of the foregoing, the evidence is insufficient as a matter of law to support a finding that defendant and another conspired to distribute or exhibit either of the films subject of the conspiracy charges. Moreover, even if it could be said that the record did contain a legally sufficient quantum of evidence to that effect, reversal would still be required by virtue of the trial court's having given jury instructions of the type condemned in the Klor case.

In the instant case, the jury was instructed that:

"Every person who knowingly prepares *or* distributes any obscene matter is guilty of a crime." (Emphasis supplied.)

"It is a complete defense to the preparation *or* distribution of obscene matter if the obscene matter is

prepared or distributed, as the case may be, in aid of a legitimate scientific or educational purpose." (Emphasis supplied.)

"It is a complete defense to *the crime of Conspiracy to prepare or distribute obscene matter* if the conspiracy was entered into for the purpose of preparing or distributing such matter in aid of legitimate scientific or educational purposes." (Emphasis supplied.)

"[I]n the crime of Conspiracy to violate Section 311.2 of the Penal Code, a necessary element is the existence in the mind of the perpetrators of the specific intent to prepare *or* to distribute obscene matter and unless such intent so exists, that crime is not committed." (Emphasis supplied.)

We are compelled to conclude that the above instructions must have led the jurors to believe that intent to distribute was not an essential element of the conspiracy charges and that conviction could result from a mere finding of intent to prepare obscene material. Although the People place great reliance upon the fact that the court did give one correctly worded instruction to the effect that "A conspiracy is an agreement between two or more persons to commit a crime, to wit: Preparing *and* Distributing Obscene Matter . . .," (emphasis supplied) we are satisfied that this solitary instruction, which merely paraphrases section 311.2 of the Penal Code, could not have overcome the effect of the four incorrect instructions set forth above. Moreover, the prosecutor effectively eliminated any conceivable benefit which could have resulted

from the one correct instruction by stating, during his argument to the jury, "We always charge in the conjunctive. It is just pleading rule. You don't have to worry about it. We charged prepare and distribute. We are allowed to prove in the disjunctive. This, that is we can prove that he conspired to prepare or conspired to distribute. Either one is illegal. It is a pleading matter. You will see that from the instructions the Court gives you. . . ." "We can prove that he conspired with another person to prepare, or to distribute. Either one. They are both illegal. We don't have to prove that he conspired to do both. You will see that from the instructions."

Defendant's conviction of aggravated assault was based upon the beating depicted in the "vertical" film. Defendant contends that said film should not have been admitted into evidence over his objection that it was not properly authenticated. He also asserts that even if the film was properly admitted into evidence, the prosecution still failed, as a matter of law, to prove the commission of an aggravated, as opposed to a simple, assault. We do not agree.

Two prior California cases have held that photographs or films are admissible as probative evidence in themselves if they are authenticated by a showing that they correctly depict what they purport to represent. In People v. Doggett (1948) 83 Cal. App. 2d 405, the court held that the photographs in question, although not authenticated by the person who took them, were properly admitted into evidence where there was unimpeached expert testimony that they were

not "composite" or "faked" and there was an entire absence of any evidence which might tend to raise the slightest doubt about the matter. The Doggett holding was reaffirmed in People v. Bowley (1963) 59 Cal. 2d 855, where the court held that even though a film cannot speak for itself as to its own authenticity, it may become probative once it has been shown, either by the testimony of the person who made it or by one who is otherwise qualified, that it is accurate and truly represents what it purports to show.

In the instant case, the testimony of Stohr, Chong and Bradford, upon which the People rely, was to the effect that the "vertical" film had not been retouched, showed no use of cosmetics, and accurately represented the scene before the camera. We are satisfied that the testimony of these experts, believed by the jury as demonstrated by its verdict, sufficiently authenticated the film for all purposes and that defendant's contention that it was not established that the entire beating had not been faked and the camera deceived, fails because defendant's evidence only raised a conflict which was decided adversely to him, with the result that the conviction of aggravated assault must be upheld. The jury was properly instructed as to expert testimony in accordance with section 1127b of the Penal Code.

There is no merit to defendant's contention that where injuries are actually inflicted, the measure of the likelihood of great bodily injury resulting from the assault is demonstrated by the injuries actually

inflicted and that in the absence of corroborative medical testimony, the "vertical" film itself could not support his conviction of aggravated assault. There is likewise no merit to his contention that the court ought to have instructed the jury that the likelihood of great bodily injury from a blow is demonstrated solely by the injury actually inflicted.

An aggravated assault, like any other assault, may be committed without the infliction of any physical injury. (People v. Day (1926) 199 Cal. 78, 85.) People v. Fuentes (1946) 74 Cal. App. 2d 737, upon which defendant relies, has never been followed and has been distinguished six times and explained once. In the recent case of People v. Muir (1966) 244 A.C.A. 679, 684-685, the court discussed the case at length and expressed the view that it "is and always was out of tune with the law of the crime of assault 'by any means of force likely to produce great bodily injury.'" (P. 684.) The court concluded that the question of whether or not the force used was such as to have been likely to produce great bodily injury was one of fact for the jury to determine on all the evidence "including but not limited to the injury inflicted" (p. 685).

Since the "vertical" film was properly authenticated, it was itself sufficient to support the jury's finding of aggravated assault, and the prosecution was not required to produce medical testimony as to the extent of the injuries actually inflicted upon the victim nor to instruct the jury in accordance with defendant's erroneous view of the law.

Defendant also contends that the consent of the victim is an absolute defense to the charge of aggravated assault and that the trial court erred in instructing the jury to the contrary. This argument cannot be sustained.

Although both parties concede that they were unable to find any California case directly in point, consent of the victim is not generally a defense to assault or battery, except in a situation involving ordinary physical contact or blows incident to sports such as football, boxing or wrestling. (See 1 Witkin, California Crimes, § 171, p. 163, and other authorities therein cited.) It is also the rule that the apparent consent of a person without legal capacity to give consent, such as a child or insane person, is ineffective. (1 Witkin, California Crimes, § 173, p. 165.)

It is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury. Even if it be assumed that the victim in the "vertical" film did in fact suffer from some form of mental aberration which compelled him to submit to a beating which was so severe as to constitute an aggravated assault, defendant's conduct in inflicting that beating was no less violative of a penal statute obviously designed to prohibit one human being from severely or mortally injuring another. It follows that the trial court was correct in instructing the jury that consent was not a defense to the aggravated assault charge.

Defendant asserts that the court ought to have excluded from evidence the verbal statements which he made to the police on the evening of November 20, 1964, during the interrogation conducted at his Sunnyvale home. This contention clearly goes to the validity of the aggravated assault conviction, since defendant admitted, during the course of said interrogation, that he was the man administering the beating in the "vertical" film.

Defendant first asserts that the statements were inadmissible because the product of an illegal search which exceeded the scope of the warrant and involved the seizure of various items which were not specified in the search warrant.

In People v. Faris (1965) 63 Cal. 2d 541, the sole case upon which defendant relies, the police arrested one Yokum and, six hours later, entered the apartment where they believed he lived and conducted a thorough search without a warrant. Defendant entered while the search was in progress and, upon being confronted with stolen property found in the apartment, made certain incriminating admissions. The court held the search unlawful, since it was made without a warrant, was not consented to and was not incidental to Yokum's arrest. The court further held that the statements made by defendant during the course of the illegal search were inadmissible as a product of the search because "the connection between defendant's responses and the illegal search was not '". . . so attenuated as to dissipate the taint"' of illegality" (p. 546).

In the instant case, the factual situation is totally different from that presented in the Faris case. The officers had obtained a valid search warrant before proceeding to defendant's residence and he has failed to demonstrate that he made any incriminating statements as a result of being confronted with items other than those described in the warrant. Moreover, the officers had probable cause to arrest defendant when they proceeded to his residence and the seizure of items other than those described in the warrant could be justified as incidental to the arrest. Since the officers did have probable cause to arrest defendant, they were also entitled, independent of any search, to question him after properly advising him of his rights.

Defendant also contends that the incriminating statements ought to have been excluded on the ground that they were obtained in violation of Escobedo v. Illinois (1964) 378 U.S. 478, and People v. Dorado (1965) 62 Cal. 2d 338. This contention is meritless, since the testimony favorable to the prosecution shows that defendant was adequately advised of his right to counsel and his right to remain silent before he made any incriminating statements. Miranda v. Arizona (1966) 384 U.S. 436, does not apply to trials commenced before June 13, 1966, the date on which that case was decided. (Johnson v. New Jersey (1966) 384 U.S. 719; People v. Rollings (1967) 65 A.C. 731.)

Defendant next asserts that the trial court committed prejudicial error in failing to order a daily transcript. In non-capital cases, the ordering of a

daily transcript is within the discretion of the trial judge. (People v. Jendrejk (1957) 152 Cal. App. 2d 462, 468; People v. Morgan (1956) 140 Cal. App. 2d 796, 806.) The record in the present case fails to show that such discretion was abused.

Defendant contends that the court erred in failing to define the word "battery" for the jury and in failing to give a sufficiently clear explanation of the difference between simple and aggravated assault. Neither contention is meritorious. Defendant did not request an instruction on battery and, in any event, the court could properly refuse such an instruction. (People v. McCaffrey (1953) 118 Cal. App. 2d 611, 618-619.) The court's instructions on the difference between simple and aggravated assault were entirely adequate and were obviously understood by the jury, which found defendant guilty of simple rather than aggravated assault in connection with the "horizontal" film.

There is no merit to defendant's contention that the court should have instructed the jury that "where the subject matter of the evidence is not within the common knowledge of nonexpert witnesses, but is solely within the scientific knowledge of medical experts, medical expert testimony is controlling over a layman's opinion in that regard." There was obviously no need for any such instruction.

Defendant also asserts that the prosecutor was guilty of prejudicial misconduct. However, the allegedly improper conduct upon which he relies consisted solely of attacks upon Anger's morals and

repeated suggestions that the "horizontal" and "vertical" films were not intended for the Kinsey Institute. The conduct in question obviously related to the conspiracy charges only and could not conceivably have contributed to defendant's conviction of aggravated assault.

Defendant asserts that his verbal admissions to third persons ought not to have been admitted into evidence until the corpus delicti of the crime of assault had been established. However, he concedes that this contention must fail if this court should conclude that the "vertical" film was itself sufficient to establish the corpus delicti of the crime of assault. This court has already held that the film was properly authenticated and that it was not only sufficient to establish the corpus delicti of the crime of aggravated assault but to support defendant's conviction of that offense.

Defendant finally objects to the admission of Logan's hearsay testimony (1) that Anger had told him that defendant was a sadist of national reputation, and (2) that Lusher had told him that Corman had admitted that he was a homosexual. Assuming this testimony to have been improperly admitted, it could not conceivably have resulted in prejudice to defendant. He himself testified at length regarding his sadomasochistic tendencies. Moreover, the nature of the "horizontal" and "vertical" films could have left no doubt in the jurors' minds that defendant, who admittedly made both films, was a man of aberrant sexual tendencies.

The attempted appeal from the order denying a new trial is dismissed. The conviction as to aggravated assault is affirmed. The trial court is directed to vacate and set aside the convictions of conspiracy and the order of probation is vacated with directions to the trial court to reconsider the same in the light of our determination.

Shoemaker, P. J.

We Concur:

Agee, J.

Taylor, J.

Filed, April 28, 1967,
Lawrence R. Elkington, Clerk.

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In the Supreme Court

of the

United States

OCTOBER TERM, 1967

No. 921

MARVIN S. SAMUELS,
Petitioner,

vs.

THE STATE OF CALIFORNIA,
Respondent.

Opposition of Respondent to Petition for Writ of Certiorari

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OPINION BELOW

Op April 28, 1967, the Court of Appeal of the State of California, First Appellate District, Division Two, issued its opinion affirming the conviction of petitioner Marvin S. Samuels, in the Superior Court of Santa Clara County, of the felony of assault by means of force likely to cause great bodily injury (Cal. Pen. Code § 245), and reversing the convictions of petitioner in the same court of the felonies of conspiracy to prepare and distribute obscene matter (Cal. Pen. Code § 311.2). The opinion is officially reported at 58 Cal. Rptr. 439; 250 A.C.A. 571 (1967).

A petition for rehearing by petitioner was denied by the California Court of Appeal on May 26, 1967; petitioner's application for hearing in the California Supreme Court was denied on July 19, 1967. These orders are not officially reported.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under Title 28, United States Code section 1257(3).

QUESTIONS PRESENTED

1. Whether the prosecuting attorney wilfully concealed or suppressed applicable defense evidence unknown to petitioner and his trial counsel.

2. Whether the prosecuting attorney knowingly made false statements in his closing argument and thereby wilfully misled the court.

3. Whether the prosecuting attorney suppressed facts and thereby violated the California State Bar Act and Rules of Professional Conduct.

4. Whether the prosecuting attorney charged petitioner with criminal counts under an unconstitutional state statute which resulted in petitioner receiving an unfair trial in violation of the Fourteenth Amendment.

5. Whether petitioner was convicted of assault by means of force likely to cause great bodily harm without evidence of a victim, without complaint of a victim and without a corpus delicti, in violation of the Fourteenth Amendment.

6. Whether evidence was used against petitioner which was obtained by an unreasonable search and seizure in violation of the Fourth Amendment.

7. Whether non-contraband material was seized from petitioner in a search incidental to his arrest and such seizure was unreasonable.

8. Whether the prosecutor procured petitioner's arrest based on information charging assault by means of force likely to cause great bodily harm from an inferior court after the grand jury had refused to indict, in violation of the Fifth Amendment.

9. Whether the trial court erred in permitting double hearsay statements about petitioner's reputation as a sadist to be introduced into evidence.

10. Whether sui juris parties may enter into a valid sadomasochistic relationship where the acts are in private with no opportunity for the public to know of their existence by any means.

11. Whether petitioner received an unfair trial because of an undue amount of sensational publicity, even though he did not seek a change in venue.

STATEMENT OF THE FACTS

Petitioner was a medical doctor specially trained in the field of ophthalmology (RT 1156-1157, 1224). He practiced in Mountain View, California, and resided in Sunnyvale, California (RT 61, 1156). Photography had been a hobby of his for many years (RT 1190). He was also keenly interested in sadomasochistic activity, recognizing in himself the symptoms of this abberation (RT 1223-1229). Moreover, he was the author of many articles on the latter subject, under the pseudonym "Michael S. Sands, M.D.", which articles appeared primarily in nudist magazines (RT 1229-1230). He had been involved years before in the production of several sadomasochistic films on the East Coast (RT 1233, 1265-1276).

In early September, 1964, petitioner met Kenneth Anger, a film producer-director, at an "after-hours" coffee shop in San Francisco (RT 624-627). Petitioner told Anger that he

had three rolls of film dealing with sadomasochism which he wished developed (RT 627). Anger volunteered to get the film developed and gave petitioner his Hollywood address.

In the middle of September 1964, petitioner mailed the three rolls of film to Anger in Hollywood (RT 630-631). They were sent to Film Service Laboratory in Hollywood where Anger had an account (RT 631-632). They were developed and returned to Anger about three days later (RT 632).

Anger examined the films on a viewer (RT 632). One roll was badly underexposed. The other two rolls were slightly underexposed but visible. Anger advised Dr. Gebhardt of the Kinsey Institute about the latter rolls and sent them to him (RT 632-633). The dark roll was mailed to petitioner (RT 634). When the other two rolls were returned to Anger by the Kinsey Institute, they were then mailed to petitioner (RT 634-635). Anger did not advise petitioner that he had sent them to the Kinsey Institute (RT 642-643, 693).

Petitioner and Anger met again in San Francisco in early November 1964 (RT 636-638). After dinner in San Francisco, petitioner invited Anger to his home in Sunnyvale (RT 638).

In the course of the evening petitioner told Anger that the three rolls he had sent to him for development had been made in the house (RT 638-639). He said that he intended to take more sadmasochistic films, using a room in the house, specially insulated and padded and equipped with eye bolts fastened to the ceiling, for the filming (RT 546-547, 638, 648-649, 667-668, 983). He also told Anger that a masochist was coming from out of state to be in the film and that he intended to make one or two rolls with this person (RT 641). Anger responded that such film would interest the Kinsey Institute and asked petitioner if he would donate the footage (RT 642). Petitioner was apparently agreeable

to this idea (RT 642-643). When photographed, petitioner would send the films to Anger (RT 640).

Petitioner projected the two rolls previously developed in Hollywood (RT 644). They were now spliced together and Anger observed that a single scene of a solitary figure, flexing muscles and wielding a whip, was cut up and inserted at different places (RT 644). The whipper was in profile and naked from the waist on up (RT 645). The other part of the composite film depicted a beating being administered upon a victim horizontally bound on a bed and an act of sodomy on this victim (RT 961-963). This film was the same one which Anger had seen, as two rolls, in Hollywood (RT 669-670, 682). Petitioner also showed Anger the special props he had in his home, including restraining belts and whips (RT 691, 703). They were stored in the study (RT 691).

Anger's next contact with petitioner was when he received a package in the mail containing two rolls of undeveloped film (RT 653-654). Anger deposited the rolls at Schaefer's Camera Store in San Francisco, using the fictitious name "Jackson" and giving a false address (RT 654). Several days later he picked up one roll and paid the developing charge.

Rudolph Stohr was a plant supervisor at Eastman Kodak Company in Palo Alto (RT 710). The other roll of film deposited by Anger in San Francisco, and sent to Kodak by Schaefer's Camera Store, was referred to him on November 17, 1964, by an employee (RT 712, 737). This film was the basis for the aggravated assault conviction. In the record it is referred to as the "vertical" film because it displays a nude man vertically suspended from the ceiling of an insulated room and being whipped by petitioner. Stohr projected it and then called the Palo Alto Police Department (RT 713-714). The film was projected for Lieutenant Ray

of the department and for Deputy District Attorney Himmelsbach of Santa Clara County (RT 714, 737). On November 18, 1964, Inspector Rudolph Nieto of the Sex Crimes Detail of the San Francisco Police Department, and Deputy District Attorney Frank Shaw of San Francisco County came to the Kodak plant to view the film (RT 714, 732, 997). Nieto concluded that the film was obscene and that it indicated a violation of law or an aggravated assault (RT 998). Stohr turned the film over to Nieto (RT 716).

Nieto left a dummy roll of film at Schaefer's Camera Store (RT 975). On the morning of November 20, 1964, Anger picked up this dummy roll at Schaefer's (RT 656-657, 975-976, 999). He was apprehended outside the store by Nieto and Inspector Lusher, also of the San Francisco Police Department (RT 657, 975-976). The film obtained by Nieto from Kodak was projected at the Hall of Justice and Anger explained its source (RT 662, 975-976).

At about 5:00 p.m. Lusher called Douglas Logan, Chief Investigator for the Santa Clara District Attorney, and advised him about the film and petitioner (RT 566-567). Petitioner's occupation and address was verified, and a search warrant for petitioner's residence and office was obtained about 6:00 p.m. (RT 62, 549, 566-567). Meanwhile, Nieto, Lusher and Anger left San Francsico for San Jose to meet with Logan in the District Attorney's office (RT 977). John Williams and Inspector Walter Ihle, both of the San Francisco Police Department Crime Laboratory, also proceeded to the meeting (RT 977). All arrived at the District Attorney's office about 7:30-8:00 p.m. (RT 568,977). They viewed the so-called "vertical" film, and Anger again described the nature of the photographed activity (RT 529, 569, 977).

This "vertical" film, upon which the conviction rests, shows a gagged and naked man strung up in an insulated

room, with his back toward the camera, receiving a beating from petitioner with whips and lashes (RT 572, 679). The beating produced welts on the buttocks, on the small of the back, and on up the body (RT 1014). In the course of the film petitioner reaches around the front of the restrained victim and appears to fondle the victim's private parts (RT 1291-1292). The film contained no splices (RT 754).

After viewing the film Logan feared that the victim was dead as a result of the attack (RT 580-581). All the officers proceeded from the District Attorney's office to petitioner's Sunnyvale residence, and arrived there at 9:00 p.m. (RT 36, 977). Also accompanying them were Deputy District Attorneys Himmelsbach and Moore, and Officer Aebersold of the Sunnyvale Department of Public Safety (RT 36-37).

Logan, Lusher and Nieto went up to the house first (RT 978). Petitioner opened the door (RT 37, 978). Logan advised petitioner that he had a search warrant, described the warrant, read it and handed it to appellant (RT 38, 535, 978). Petitioner read the document and let the three officers in.

The house was in semi-darkness, the only light coming from the kitchen (RT 38, 558, 978). A man, later identified as William Corman, was sitting on a couch in the darkened living room (RT 38-39, 979). A movie screen was set up in the living room and a projector was on the dining room table (RT 38, 530-531, 979). Nieto observed two cannisters of film on the table by the projector (RT 52-53, 979). These cannisters were later noticed by Logan as well (RT 38, 55, 530, 559-566).

Logan, after showing the warrant to petitioner, turned his attention to Corman and questioned him for several minutes (RT 59, 560-561). Meanwhile, Nieto went into the bedroom and petitioner accompanied him (RT 979-980). Within five or six minutes, Logan joined them in the bed-

room. He immediately advised petitioner of his constitutional rights (RT 563, 979-980, 1005-1006, 1097). No threats or promises were made (RT 1092-1094). Logan asked petitioner if he knew the name of the person suspended from the beams (RT 1094). Petitioner said he had met him in a bar in San Francisco (RT 1094). He said the beating had taken place in the padded room between the bedroom and the living room (RT 1094). He explained that there was no third party involved because his camera operated automatically (RT 1094-1095). Then he said he wouldn't say anything more until he consulted an attorney (RT 1095). The conversation consumed 5-10 minutes (RT 1099).

Nieto left the bedroom, entered the living room and talked with Corman (RT 1005-1006). He then went outside the house, checked the cars parked in the driveway and in front of the house and told Williams and Ihle to come in (RT 1005-1006). Nieto reentered the bedroom and had his first conversation with petitioner at about 9:30 p.m. (RT 980, 1007).

Nieto told petitioner that he had seen a film where a man was manacled to the ceiling and was being beaten. He asked where this had occurred and petitioner indicated the insulated and padded room (RT 981). Petitioner said he had met the victim in a "gay" bar in San Francisco. Then he said he met the man, whom he knew as "George", at Foster's Restaurant in San Francisco (RT 982-983). He described the man as a masochist who had voluntarily submitted to the beating (RT 982-983). Petitioner identified himself as the sadist in the movie and as being well-known as a sadist (RT 983, 1009). He then explained how he had used adhesive tape as a gag on the victim's face (RT 982-983). He also told Nieto that he had studied law for two years (RT 1007-1008).

Nieto went with petitioner into the special room (RT 982-984). Nieto observed the eye bolts attached to the ceiling of the room (RT 982-983). He asked petitioner how the victims feet had been anchored. Petitioner said the feet had been strapped to the studs on either side of the room (RT 983-984).

A thorough search was conducted in the house. Among the items seized were a projector, movie screen, two tripods, movie camera, voltage converter, film editor, and movie lights. The officers also found a switch, whip, black leather belt, motorcycle hat, black leather jockstrap, restraining belt, belt with a lock, and a glove. The officers also seized the film on the projector table. Logan took custody of these items (RT 991, 1095).

During the evening Logan had a further conversation with petitioner who told him that he was a law student and knew the officers couldn't do anything because the victim was a willing partner (RT 1097-1098). Petitioner told Nieto that he had been watching or projecting the film "Fire Island" before the officers arrived (RT 1021). Corman had made a similar statement to Logan (RT 561). Nieto indicated his concern as to whether the victim in the vertical film was alive and petitioner replied that he was (RT 1112-1114).

Petitioner was arrested around 10:30 p.m., just prior to the time the officers left his residence (RT 58, 564, 984, 1095). They proceeded with him to his office in Mountain View where the search continued (RT 61, 65, 565, 984). Nothing was seized (RT 61, 984). He was booked at the Sunnyvale Department of Public Safety at 11:40 p.m. (RT 565).

Lowell W. Bradford was Director of the Laboratory of Criminalistics for Santa Clara County (RT 753). He examined the vertical film and found no splices in it (RT 753-

754). The film was approximately 100 feet long. Bradford extracted certain sections from the film by way of color slides which were then made into prints (RT 800-801). Taking a particular section of the film, which showed part of the beating, he concluded that the camera had not been stopped at any time between the beginning and end of the section (RT 818, 819, 891). From examining the pictures he formed the opinion that no cosmetics had been used on the victim and that the marks and welts which appeared on the victim occured there progressively, frame by frame. The section showed the lash in motion directed towards the back of the subject in each frame. The movement of the lash was so rapid that it was not completely stopped by the camera. The black line of the lash appeared in each picture (RT 819-820). The pictures also showed the progressive development of the wounds in size and color without evidence of camera stops (RT 820-824).

Bradford examined the film for evidence of retouching (RT 803, 830). The film was checked by viewer and by microscope (RT 802). Bradford concluded that there was no retouching and expressed the opinion that the film truly and correctly represented what was in front of the camera (RT 803, 830).

Edward Chong, Senior County Photographer, was of the same opinion (RT 1056-1057). Rudolph Stohr, the Kodak supervisor, was also of the opinion that the camera actually took or depicted what was taking place (RT 726). He found no evidence of alteration or retouching of the film (RT 726).

Logan was of the opinion that the room used for the vertical beating was the insulated room in the house (RT 581-582). The room also contained two loose wires which, when touched together, operated a locking mechanism in

the door frame. New walls had been constructed over the existing walls (RT 536-539, 546,547, 648-650, 1018).

Logan and Nieto were concerned about the whereabouts of the victim (RT 1021-1022). Efforts were made to locate and identify the victim (RT 1020-1022, 1025-1026). On cross-examination, defense counsel elicited from Nieto that his subsequent investigation disclosed that petitioner had been previously arrested in Texas for oral copulation (RT 1023).

About a week after the arrest, petitioner phoned Anger and admonished him for talking to the police (RT 670-671).

Petitioner testified in his own behalf (RT 1156).

He stated that the film was made in his home in early September 1964 (RT 1195), about a week to ten days prior to the arrest (RT 1217). The masochist was picked up at a bus depot in San Jose. He was strung up with hospital restraints and lightly tapped with a riding crop. The camera was stopped periodically and cosmetics were applied. The victim was coached to move violently to feign pain. He hung there for about four hours (RT 1219-1222). Petitioner administered the beating dressed in a black leather jockstrap, motorcycle boots and a motorcycle hat (RT 1241-1242). No cosmetics, however, were found on the numerous torture instruments used by petitioner.

Petitioner's testimony respecting the arrest and search varied considerably from the testimony of the officers. According to the petitioner the officers came to his home around 8:00 p.m. The house was adequately lighted. The search warrant was not read to him but merely handed to him, and he read only the typed-in print (RT 1161-1163). At this time the projector was still in his study closed, though he was intending to show Corman, a patient being fitted with contact lenses, the film "Fire Island" (RT 1160-1163).

His versions of the conversations also differed from the testimony of the officers. According to petitioner, he was not advised of his rights until about 10:00 p.m., although he admitted knowing of his rights (RT 1167).

John Barnes, a professional photographer, testified for the defense. He stated that petitioner's camera can be stopped without any indication of a stoppage on the films, such as a blank frame caused by an open shutter (RT 1394). The prosecution established that Barnes was on probation for grand theft committed in a camera store (RT 1379).

Dr. Robert Malone, a surgeon and physician for a high school football team, viewed the "vertical" file shortly before he testified and was of the opinion that while the marks on the victim were in part caused by the blows, not all the color changes and marks were so caused (RT 1410).

William Corman testified for the defense that the police arrived at petitioner's home about 8:00 p.m.; that the projector was not set up; that the officers left about 11:00 p.m. (RT 1460, 1461, 1472).

SUMMARY OF ARGUMENT

Petitioner's allegations totally fail to present any substantial federal questions. His reference to an allegedly suppressed letter and to the prosecuting attorney's alleged actions in securing the amended indictment and information are matters outside this record and not properly before the Court on a certiorari petition.

Petitioner was validly convicted of assault by means of force likely to cause great bodily injury, and that conviction is supported by the evidence and is not connected with the allegedly suppressed letter or the purported unreasonable search and seizure. Moreover, the reversal of the conspiracy

convictions by the California Court of Appeal did not require that court to afford petitioner a new trial on the assault conviction which it affirmed.

ARGUMENT

I. There Is No Record Evidence That the Prosecuting Attorney Concealed or Suppressed Applicable Defense Evidence.

Petitioner alleges that the prosecutor had in his possession, and suppressed, a letter from the Kinsey Institute to prosecution witness Anger, which document was valuable to the defense and unknown at trial to petitioner and his counsel. The letter is not part of the trial record. What purports to be the content of the letter is set out in the petition at pages 4 and 5.

The question raised by petitioner, of course, cannot be determined on the record before this Court because that record is silent respecting the alleged letter. Petitioner's remedy is not by a writ of certiorari to review his direct appeal from the judgment of conviction but by post-conviction proceedings such as utilized in the cases he cites: *Giles v. Maryland,* 386 U.S. 66 (1967), and *Miller v. Pate,* 386 U.S. 1 (1967). Nevertheless, some observations respecting this contention are in order.

Accepting the purported letter at face value, it is apparent that it is unrelated to the "vertical" film upon which petitioner's conviction of assault is based. However, it may refer to the two rolls of film which Anger sent to the Kinsey Institute after they were developed in Hollywood (RT 630-635). The film upon which the assault conviction rests was obtained directly from the Eastman Kodak laboratory in Palo Alto after development and never went to the Kinsey Institute (RT 712-716). Consequently, there is absolutely no relevance of this letter to the assault conviction which petitioner seeks to have reviewed by this Court.

The record, though silent regarding any letter, does disclose that Anger sent the two rolls of film developed in Hollywood to the Kinsey Institute without the knowledge of petitioner (RT 642-643, 693). Anger further testified that the two rolls were immediately returned to him by Dr. Gebhardt of the Kinsey Institute (RT 634-635). Defense counsel cross-examined Anger at length and made no attempt to elicit from him anything concerning a letter from Dr. Gebhardt or anything concerning the reaction of the Kinsey Institute to the films (RT 680-702, 706-608). Indeed, since petitioner had no knowledge that the films were even reviewed by the Institute, we can perceive nothing of value for the defense in the letter. The letter merely advises Anger that "Bill" would return some film and states that it was of "definite interest." The prosecuting attorney's argument that there was no evidence in the case that petitioner had any contact with the Kinsey Institute was accurate, even taking into consideration the purported letter between Dr. Gebhardt and Anger concerning a transaction which did not involve petitioner.

Petitioner contends that the prosecutor did "wilfully mislead the Court" by the above argument. Apparently he means "jury" rather than "court," since petitioner was convicted by a jury. We see no misleading of the jury, wilful or otherwise, in the prosecutor's argument since the argument is a fair statement of the record evidence. Moreover, the further contention that the prosecutor violated the California State Bar Act and Rules of Professional Conduct certainly does not raise any federal question.

The letter may have had some remote connection with the conspiracy prosecutions inasmuch as the defense contended that petitioner's films were produced for legitimate scientific purposes which, if proven, would have been a

complete defense to the conspiracy charges (Cal. Pen. Code § 311.9). The conspiracy convictions were reversed on appeal and the defense of scientific purpose has no application whatsoever to the assault conviction which was affirmed.

The cases cited by petitioner do not help him. In *Giles v. Maryland*, 386 U.S. 66 (1967), the credibility of the prosecuting witness in a rape case was at issue at trial and this Court remanded the case for further evidentiary proceedings on the question of whether the prosecution suppressed evidence relating to the credibility of the witness or allowed false testimony to remain uncorrected in the record. In *Miller v. Pate*, 386 U.S. 1 (1967), a murder case, this Court found that the prosecution's theory at trial was that the murder took place in the course of a sexual attack and that the stains on the defendant's shorts were human blood. The prosecutor knew at the time that the stains were actually paint and not blood. Consequently, the conviction was reversed because it was obtained by the knowing use of false evidence. In both cases there was a direct connection between the allegedly suppressed evidence and the convictions being attacked. Here, there is no such relationship for the allegedly suppressed letter was irrelevant to the assault prosecution.

II. The Reversal of the Conspiracy Convictions Does Not Require Reversal of the Assult Conviction.

Petitioner contends that the state statute under which he was charged on the conspiracy count was unconstitutional and that petitioner was entitled to a new trial on the assault charge without the "now dismissed inflammatory and unconstitutional counts."

Petitioner was charged with two counts of conspiracy to violate California Penal Code section 311.2, which provided then and still provides:

> "Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute, any obscene matter is guilty of a misdemeanor."

The jury was instructed that a violation of the statute would occur upon a mere showing of the preparation of obscene materials. Subsequent to the trial, however, the California Supreme Court, in *In re Klor*, 64 Cal.2d 816, 415 P.2d 791, 51 Cal.Rptr. 903 (1966), held that section 311.2 does not penalize the mere preparation of obscene material without the intent to disseminate or distribute such material. Consequently, the obscenity convictions were reversed because the case was tried upon an unconstitutional construction of the statute. However, at the time the prosecutor brought the conspiracy charges against petitioner, the statute was not "clearly unconstitutional" as petitioner argues.

The petitioner here was validly charged with the two conspiracy counts, as well as two assault counts and one sodomy count. The fact that his conviction on one of the assault charges remains the only standing conviction does not mean he was the victim, using petitioner's words, of "overbooking and over charging." Moreover, the argument that some unspecified prejudice seeped over from the consipracy prosecution to taint the assault prosecution was not raised in the court below.

III. The Evidence Was Sufficient to Support the Conviction of Assault.

Petitioner contends that the assault conviction cannot stand "where there never was a 'victim'; where there was

no complaint; where there was no corpus delicti." We ask what better evidence of an assault is there than an authenticated movie of the actual crime as it was committed?

The film depicts the gagged and helpless victim suspended by his hands from the ceiling of an insulated room. Petitioner is identified as, and admitted to being, the wielder of the whip. The victim squirms in agony as petitioner brings the whip to the victim's body and carries out a prolonged and vicious beating.

No less than three qualified photography experts testified that the film accurately depicted the actual event taking place in front of the camera. There were no splices or camera stops in the film; there was no evidence of retouching or tampering; there was nothing to indicate cosmetics were used to produce the wounds upon the victim's body.

Petitioner argues that the victim entered into a valid sadomasochistic relationship with petitioner, and the acts, committed in private, were not criminal. Of course, the victim was not produced and, consequently, there is no evidence that the victim actually consented to the aggravated beating he received. The bound and gagged victim was hardly in a position to give or take away any consent to the assault. Once suspended from the ceiling, he was at the "mercy" of petitioner.

Even if it be assumed that the victim consented to the use upon him of force likely to produce great bodily harm, petitioner's conduct in inflicting the beating was nevertheless violative of the assault statute which was obviously designed to prohibit one human being from severely or mortally injurying another.

IV. No Search and Seizure Issues Are Properly Presented.

The film of the "vertical" beating was not seized from petitioner but was obtained by the authorities from the

Eastman Kodak Company after processing. Nevertheless, petitioner complains about the search of his home that produced the other film which was the basis of one of the conspiracy counts now reversed. Accordingly, there is no search and seizure problem connected with the assault conviction.

The search of Petitioner's home was pursuant to a search warrant (RT 62, 141, 549, 566-567). While the search warrant described only "instruments of torture", the officers were not restricted, as petitioner suggests, to seizing only contraband, fruits or instrumentalities of the crime. The distinction prohibiting seizure of items of only evidential value is no longer accepted as being required by the Fourth Amendment. *Warden v. Hayden,* 387 U.S. 294 (1967). The seizure of evidence from petitioner's home, assuming that it has some relationship to the assault conviction, was proper pursuant to the warrant or, in the alternative, as incidental to his arrest after discovery of the specified "instruments of torture."

V. Petitioner's Other Contentions Also Fail to Present Substantial Federal Questions.

Petitioner contends that the trial court permitted into evidence "double hearsay" statements about petitioner's reputation as a sadist (See RT 127, 153-154). There was no objection by defense counsel to this testimony. The admissibility of such evidence, of course, only involves state law or state procedure. It is also contended that petitioner's trial was unfair because of alleged sensational pretrial publicity. Again, there was no complaint about publicity made to the trial court and no motion to change venue. The trial jurors were repeatedly admonished throughout the proceedings to avoid such influences. The failure of defense counsel to object to the purported "double hearsay" and to the alleged "sensational publicity" forecloses petitioner's

contention that some federal question is at issue in these matters. *Schmerber v. California,* 384 U.S. 757, 765-766, fn. 9 (1966).

Petitioner was indicted by the grand jury and also held to answer after a preliminary hearing in the municipal court. He was arraigned on an amended indictment and information (CT 7-11). The transcripts of the proceedings before the grand jury and the municipal court are not parts of the appellate record and, consequently, petitioner's allegation that the grand jury refused to indict him on the assault charge is unsubstantiated.

The facts are that petitioner was indicted by the grand jury on two counts of conspiracy and one count of sodomy, and was held to answer after preliminary hearing on the same charges plus two counts of assault. The accusatory pleading which resulted merely brought petitioner before the superior court for trial. His conviction rests upon the record evidence and not upon any evidence or lack of evidence before the grand jury or municipal court.

CONCLUSION

We respectfully submit that petitioner's application for a writ or certiorari should be denied.

Dated, San Francisco, California,
April 3, 1968.

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